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ABSTRACT

Like other types of dispute resolution, mediation brings the parties in conflict together to solve their problems. It provides a fresh perspective by introducing a third party who is entirely neutral and is skilled in helping parties solve their problems. With the increasing dissatisfaction with the formal justice system, mediation has been established as another alternative to resolving disputes because of its unique features. Unlike the adjudication or arbitration process, the mediation conference is conducted informally: rather than by examination, the facts are gathered in a narrative fashion; contrary to formal legal procedure, the rules do not apply. Finally, except for the mediation contract, no record is kept of the mediation session. Each disputant is encouraged to participate fully in each step of the process and the sole responsibility of the mediator is to assist the parties in developing a mutually satisfying solution to the grievance. Skilled in communication strategies, the mediator must be able to help the disputants improve their own communication skills. This can be done in a variety of ways, all geared toward structuring the environment for successful problem solving strategies. Since the late 1960s, over 200 mediation programs have sprung up across the country. Because speech communication specialists--particularly in the field of interpersonal communication--are human relations specialists, they may find mediation a new avenue for exercising their talents. (HOD)

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"MEDIATION: THE APPLICATION OF INTERPERSONAL SKILLS IN A LEGAL SETTING"

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A printing firm cannot collect from a disgruntled customer...a new swimming pool owner argues with the contractor about repairs...a couple cannot agree on separation arrangements...a young boy is suing a chum for damages done by his friend's pit bull terrier...a homeowner will not pay for an oil delivery she did not order...two roommates have the dormitory in an upheaval with their constant fighting...

These kinds of disputes, which range across a wide spectrum of conflicts are now being settled by a nonjudicial form of justice--mediation. Since the late 1960's, over 200 programs have sprung up across the country, financed by foundations and local or federal government grants. Each year thousands of potential litigants decide that their "day in court" should not be in court at all; rather they opt to avail themselves of the services of a trained mediator, in a relaxed informal problem-solving session wherein the disputants themselves play a significant role in the resolution of their own conflict. (Schneider 1981).

Disadvantages of Judicial Proceedings

In significant numbers, individuals, neighborhoods, groups, schools, and businesses have become increasingly frustrated by the court judicial process. The formal criminal and civil justice system is seen as cumbersome, arcane and myopic. There is the recognition that the formal court system is not suited to handle the range and number of interpersonal suits brought to it. Moreover the adversary process itself is not suited to resolve the full range of disputes that occur between people. The rules of law do not apply in the realms of human relations since they are designed to regulate observable behavior; thus only the symptoms of the conflict are addressed, not the roots. From a legal perspective, conflict is seen as a deviation from the prevailing rules. From the perspective of mediation, conflict is seen as a necessary and potentially useful experience that does lead to individual growth and new awareness. (Rifkin 1982).

It is the thesis of this paper that the speech communication specialists, particularly in the field of interpersonal communication, are human relations specialists, and as such, may find mediation a new avenue for exercising their talents, training potential (mediators) candidates and serving as liaison officers to our colleagues in the legal profession.

This paper will explain the philosophy of mediation, describe the mediation procedure, list the qualifications of the mediator and indicate those areas of human conflict in the community and business, making use of this unique form of justice.

Philosophy of Mediation

Conflict is endemic to systems in dependency relationships. Managing conflict from this perspective consists of setting up various types of structures both formal and informal within which negotiation is one structure. (Brett, Goldberg, Ury 1980).

Like other types of dispute resolution, mediation brings the parties in conflict together to solve their problems. It provides a fresh perspective by introducing a third party who in entirely neutral and is skilled in helping parties solve their problems. With the increasing dissatisfaction with the formal justice system, mediation has been established as another alternative to resolving disputes because of its unique features. Unlike the adjudication or arbitration process, the mediation conference is conducted informally; rather than by examination, the facts are gathered in a narrative fashion contrary to formal legal procedure, the rules of evidence do not apply. Finally, except for the mediation contract, no record is kept of the mediation session(s). Each disputant is encouraged to participate fully in each step of the process and the sole responsibility of the mediator is to assist the parties in developing a mutually satisfying solution to the grievance. In the spirit of promoting ownership of the problems and their solutions, the mediators rarely propose a settlement, instead point out the parties' area for settlement and then encourage each to invent his/her own proposals.

The Mediation Process: An Overview

The mediation process can be characterized as follows: it is (1) a non-compulsory procedure in which (2) an impartial, neutral party is invited or

accepted by (3) parties to a dispute to help them (4) identify issues of mutual concer and (5) design solutions to these issues (6) which are acceptable to the parties.

Operating as one very specific type of negotiation, parties agree to negotiate only when they perceive that they lack the power to obtain their goals unilaterally. The mediator's role, as classically conceived, is simply to assist these negotiating parties to agree upon mutually acceptable terms. In helping the disputants, the mediator reaffirms their active role in the problem-solving process while suggesting the limited authority of his/hers. If the mediator's efforts succeed, the parties will have an agreement and the mediator leaves. If the efforts fall short of an agreement, the parties must find another way of settling the dispute. (Stulberg 1981).

This characterization of the mediation process results in the application of mediation to a wide range of disputes. It can commence when either of the disputant parties or the mediator believe mediation would be useful.

The Functions of a Mediator

The functions of a mediator are determined by this basic mediation framework. He or she operates within the parameters of the process and attempts to maximize the benefits of this type of negotiation. The central quality of this process is its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitude and dispositions toward one another (Fuller 1971).

1. The mediator is a catalyst: his/her presence affects how the parties interact.

2. The mediator is an educator: he/she must know the needs of both parties, both stated and implied, and be well versed in the dynamics of controversy.

3. The mediator is a translator: each parties' proposals must be conveyed in language free of evaluative or emotional overtones, yet faithful to the objectives of each parties' position.

4. The mediator is an agent of reality: By assessing the validity of the proposals he/she must often comment on the reasonableness of an objective. Through reality testing he/she is able to ascertain whether a particular goal can of cannot be realistically attained.

With this list of the mediator's functions, we may now proceed to examine the type of person most able to discharge these functions effectively. In general, the qualities and attributes of the successful mediator would include intelligence, patience, resourcefulness, reliability, imagination and forcefulness. There are specific qualities as well.

As a specialist in interpersonal skills, the mediator is mindful of the anger and mistrust which invariably accompanies disputes and he must be skilled in diffusing these emotions early-on in the mediation session. As a creative problem solver the mediator is continually developing multiple options and encouraging creative ideas from the disputants from which reasonable options can be developed. The mediator should possess both content knowledge and communication skills. The content knowledge will include working procedures, political and/or social limitations and business constraints of the parties. Content knowledge might also include statutory provisions and technical expertise, not for the purpose of serving as an expert, but to form the basis for asking penetrating questions, establishing priorities, and for determining real or imagined obstacles.

The successful mediator has some very specific communication skills. He/she must be articulate--using a vocabulary that can identify the parameters of a dispute with precision and objectivity. In directing the conflict towards resolution, he/she continually communicates to the parties the cost to each if a resolution is not reached. The language must be impartial and proposals stated in such a way that each party will understand how its particular position can be perceived from a different point of view. A different perspective and, perhaps new understandings (carefully worded) will go a long way toward accomplishing a major objective of mediation: to press each party to reconsider their initial positions and/or proposals.

Another communication competency the mediator must have is listening skill. Comprehension skills must be such that all information, cognitive and affective, can be duly noted and accurately prioritized. Throughout the resolution process, the mediator should painstakingly listen and watch for cues to indicate where the parties have indicated agreement, however minimal. This will enable him/her to shape the discussion to indicate the points of agreement along the way, making proposals to coincide with the shared interests that the parties themselves have suggested.

Part of the mediator's communication repetoire is his/her sensitivity to nonverbal cues. Often much of what lies at the root of a conflict is never stated in concrete terms, but it is evident in the facial expressions, vocal tones and body language of the disputants. The successful mediator is sensitive to these cues, and, either through the skillful use of his/her language--verbal or nonverbal--he/she acknowledges and responds to what is often a hidden agenda. Verbal and nonverbal feedback is used liberally throughout the mediation sessions as a means of reassuring both parties that all the dimensions of the conflict are understood.

A mediator must actively seek out information. As a skillful questioner he/she uses this method of inquiry in two ways: One task is to determine the precise position of each disputant and what are the specific issues involved in the dispute. The mediator's skill rests in how the data is obtained. The questions must be phrased so that they focus on the interests of each party and not on their positions. Interests will be perceived as part of a solvable problem; positions invariably lock the disputants to a single irrevocable perception.

The skillful use of questions can serve as a conciliatory device as well by getting the parties to overtly agree with one another whenever possible. Where the disputant parties have indicated shared interests or values however slight or minimal, the mediator seizes the opportunity to phrase this agreement as a question which can only be answered in the affirmative. This technique gets both disputants to agree to what is now perceived as shared concerns. (Fisher 1980).

It is important that the mediator be cognizant of the dynamics of a conflict. Each dispute has its own propulsive forces at work and the parties on each side have individual personalities having a strong impact on the direction of the resolution and the communication strategies the mediator will choose to use. Often it is the emotions and frustrations under which the parties act that contribute to the range of settlement possibilities.

Sensitive to the human dynamics inherent in all conflict situations, mediators may never make proposals at the expense of making one party appear the weaker. Face saving is part of this. Often a party will refuse a proposal, not because it is unacceptable, but because they want to avoid the appearance

of backing down. The substance of any proposal, therefore, is phrased in such a way that it is consistent with shared interests and values. The proposal must be perceived as adhering to logical and reasoned principles.

Earlier in this paper it was stated that one of the functions of the mediator is that he/she be an educator. Skilled in communicatien strategies he/she must be able to help the disputants improve their own communication skills. This can be done in a variety of ways, all geared toward structuring the environment for successful problem solving procedures. The mediator gives purposeful direction to all of the steps which take place in the mediation process, much like a teacher who has procedural knowledge, and then oversees the process and directs the actions of the participants.

Uses of Mediation

Mediation has been proven so successful as a form of conflict resolution that it is being used in a variety of situations. One example is labor/management disputes. In a controlled experiment using mediation instead of the arbitration process during the term of a collective bargaining agreement, the results were overwhelmingly successful. The evaluation criteria used to determine its success were the final resolution rate, cost and time savings and the parties' satisfaction with the mediation process. (Goldberg 1971)

One of the most frequent uses of mediation is in community-based mediation teams found in local district small claims courts. In this setting, a wide variety of neighborhood and business disputes are being resolved not by a judge, but by a court appointed volunteer mediator who has been trained in conflict resolution skills. In Maine, court mediation is a free state-funded service.

Recently, high schools and colleges have developed mediation programs in the attempt to resolve their own in-house kinds of conflicts and as a means of limiting the use of formal law in academic matters. In Dorchester, Massachusetts, high school students are being trained by the local district court in mediation techniques to settle school disputes. As an alternative to disciplinary committees, a teacher/student panel of mediators is being formed to talk out each's viewpoints on a problem until they are able to reach a resolution which is acceptable to both.

In the college community, there is a substantial volume of civil disputes, some of which are unique to academic institutions, such as student/faculty interpersonal conflicts, dormitory problems, fraternity issues, and conflicts rising from racial and sexual tensions. The University of Massachusetts has initiated a mediation project which is felt to be a creative alternative to the conventional judicial process in the resolution of a variety of disputes within their campus community. (Rifkin 1982).

Environmental disputes are being settled in increasing nubmers through mediation because of the public's growing disenchantment with the courtroom as the legitimate place for making decisions about natural resources. It is felt that the mediator as an intermediary, a fact finder, and an impartial third party can help opponents move toward a mutually acceptable outcome. (Denenberg & Denenberg 1981).

Significant numbers of prisoner complaints are being remedied with a grievance procedure similar to the mediation/negotiation model. Administrators recognize that the smoothness with which a prison operates depends very much on the willingness of the prisoners to cooperate. The procedure which includes provisions for mediation contributes to a more harmonious relationship by providing a forum in which resentments can be brought out into the open and dealt with cooperatively.

Family conflicts form the basis for still another form of interpersonal dispute, and mediation programs are being developed to serve parents and their children. Noncriminal misbehavior, such as truancy or running away are perceived as a family problem, not just the child's. Through community social service agencies, parent and child mediation is being provided to help improve intrafamily communication. Separation and divorce are other aspects of family disputes receiving national attention. Recently, a Boston municipal judge released figures from this Probate Court citing 80% of the divorce cases brought to the Family Service Office for temporary orders were successfully mediated. On the national level the American Arbitration Assocation has inaugurated intrafamily mediation services to help couples arrange separation agreements. (Denenberg & Denenberg 1981).

Mediation is now explicitly recognized and promoted as an alternative to adversary legal procedures in the resolution of many types of social conflicts. The two hundred mediation projects now in operation across the United States gives testament to the success of a process that fosters voluntary and consensual agreement to disputes.

The advancement of this form of negotiation is due in large measure to the people who have chosen to become mediators. The recruits have not come from any particular profession; rather they represent a wide cross-section of the population. There are no special requirements except that the candidates understand the procedural rules and have those communication skills noted earlier in this paper. Fortunately, most who have served as mediators, up to the present time, have met these requirements.

As mediation continues to develop as a viable alternative to the judicial system, there will be an increasing need for a system for recruiting and training mediators. The speech communication specialist, with his/her expertise, could make a valuable contribution in the ongoing development and success of this nonjudicial form of justice.

REFERENCES

Brett, J.M., Goldberg, S.B. and Ury, W. Mediation and organizational development: Models for Conflict Management. IRRA 33 Annual Proceedings, 1980, 195-202.

Denenberg, T.S. and Denenberg, R.V. Dispute Resolution: Settling Conflicts Without Legal Action, Public Affairs Pamphlet No. 597 1981 7-24.

Filley, Alan, Interpersonal Conflict Resolution , Glenville, Illinois: Scott, Foresman & Co. , 1975.

Fisher, Roger and Ury, William, Getting to Yes, New York: Houghton-Mifflin 1981.

Frost, Joyce and Wilmott, William, Interpersonal Conflict, Dubuque, Iowa: Wm. C. Brown Co. 1978.

Fuller, Lon, "Mediation - It's Forms and Functions" California Law Review 44:305 1971.

Goldberg, Stephen B., "Grievance Mediation: Settlement Techniques" in Max H. Bazerman and Roy J. Lewicki (Eds.) Bargaining Inside Organizations Beverly Hills, California: SAGE, in press.

Kersler, Sheila Creative Conflict Resolution: Mediation . Atlanta, Georgia: Institute for Professional Training, 1978.

Rifkin, Janet "Mediation Disputes: An American Paradox" Paper presented at the NASPA Conference, Boston, Massachusetts, 1982.

Stulberg, Joseph B. "The Theory and Practice of Mediation: A Reply to Professor Sussking" Vermont Law Review 6:49 , 1981, 86-117.